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ABSTRACT

On November 5, 1996, California voters approved Proposition 209, which prohibits discrimination against or the granting of preferential treatment to anyone on the basis of race, sex, color, or ethnicity in the operation of public employment, education, or contracting. Regarding the prohibition of discrimination, 209 creates no new restrictions since public agencies in California are already subject to numerous federal and state anti-discrimination laws. Regarding preferential treatment, the state Superior Court has ruled that the bans of 209 are limited and that certain activities that may benefit underrepresented groups, such as outreach programs, fall outside its scope. It also appears that the "preferential treatment" clause of 209 has the same scope as the Equal Protection Clause of the Fourteenth Amendment, which allows preferential programs if a compelling reason, such as remediating past discrimination, is demonstrated. The only real impact of 209, then, would be to outlaw any type of non-remedial preference which might continue to be permissible under equal protection analysis. However, most of the affirmative action programs operated by the community colleges or administered by the Board are mandated by statutes which would continue to apply unless ruled unconstitutional. While 209 may require community college districts to eliminate preferences in locally developed programs, it is recommended that final decisions be held in abeyance pending the outcome of litigation concerning the measure. (HAA)

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Preliminary Analysis of the Impact of Proposition 209 on the California Community Colleges

Prepared by

California Community Colleges
Office of the Chancellor

November 1996

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Preliminary Analysis of the Impact of Proposition 209 on the California Community Colleges

I. Introduction

On November 5, 1996, the voters of California approved Proposition 209 which adds Section 31 to Article I of the California Constitution. The heart of the provision is its first clause which states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

It seems highly likely that the meaning and validity of Proposition 209 will be the subject of extensive litigation in the next few months or years. Indeed, on November 6, 1996, the American Civil Liberties Union and other civil rights organizations filed suit in U.S. District Court in San Francisco challenging the constitutionality of Proposition 209 and asking the court to issue an injunction blocking its implementation. Therefore, this analysis is only intended to provide a very preliminary discussion of some of the key issues that will arise when and if the courts permit implementation of the Proposition. The first part of the analysis considers several general questions related to the meaning and scope of the Proposition. The second part of the analysis focuses on the impact the measure might have on the activities of the Board of Governors and the Chancellor's Office. Then, in the final section we turn to a review of the possible impact of the measure on local community college districts.

II. General Matters

A. Text of the Proposition

To provide a starting point for this analysis we first set forth the full text of the new Section 31 of Article I which was added to the California Constitution by Proposition 209:

> SEC. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
> (b) This section shall apply only to action taken after the section's effective date.
> (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
> (d) Nothing in this section shall be interpreted as invalidating any

court order or consent decree which is in force as of the effective date of this section.
(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.
(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

The two principal facets of Proposition 209 which require consideration are the prohibition against discrimination on the basis of race, sex, color, ethnicity, or national origin and the prohibition against granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin.

B. Prohibition of Discrimination

Apart from Proposition 209, public agencies in California are already subject to numerous federal and state laws which prohibit discrimination on the same grounds. At the most fundamental level, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Equal Protection Guarantee of the California Constitution (Art.1, Sec. 7) both preclude discriminatory application of the laws. Article I, Section 8 of the California Constitution further prohibits disqualifying persons from pursuing employment because of sex, race, creed, color, or national origin. California Government Code, Section 11135, prohibits discrimination in any program that is funded by or receives financial assistance from the state. Government Code, Section 18500, represents the Legislature's intent that State Civil Service employment, including employment by the Board is made "without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual orientation, disability, political or religious opinions or non job-related factors." In addition, public employers in California are bound by the Fair Employment and Housing Act (Government Code ¤ 12900 et seq.) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. ¤ 2000e). Finally, educational institutions receiving federal financial assistance are prohibited from discriminating in their educational offerings on the basis of sex by Title IX of the Education

Amendments of 1972 (20 U.S.C. ¤ 1681) or on the basis of race, color, or national origin under Title VI of the Civil Rights Act of 1964 (42 U.S.C. ¤ 2000d).

Although the foregoing is not a complete list of laws prohibiting discrimination, it demonstrates that Proposition 209 adds nothing in the area of nondiscrimination that is not already in place at the constitutional or statutory level. In other words, the prohibition on discrimination in Proposition 209 creates no restrictions on the activities or programs of public entities in California which did not already exist.

C. Prohibition on Granting Preferential Treatment

Therefore, the only part of Proposition 209 with any potential impact is the prohibition on "preferential treatment." Unfortunately, the Proposition provides no definition of this critical term and, pending further review by the courts, we are not able to provide definitive guidance at this early stage. Nevertheless, the following analysis suggests that even the "preferential treatment" clause may have little if any effect.

1. Outreach Programs

Only one case has analyzed the language of Proposition 209. That case involved a challenge to the language prepared by State Attorney General Lungren in the ballot title and the ballot label for Proposition 209. (Lungren v. Superior Court (1996) 48 Cal.App.4th 435, 55 Cal.Rptr.2d 690.) In that case, opponents of Proposition 209 claimed that the ballot title and ballot label were misleading. The title was "Prohibition against discrimination or preferential treatment by state and other public entities." The ballot label stated that Proposition 209 "generally prohibits discrimination or preferential treatment based on race, sex, color, ethnicity, or national origin in public employment, education, and contracting. . . ." The opponents challenged these descriptions "in that they fail to describe the true purpose of Proposition 209 which the opponents argue is to prohibit affirmative action by state and local government." The Superior Court agreed and directed the Attorney General to revise the information. The Attorney General then sought a peremptory writ from the Court of Appeal directing the Superior Court to vacate its judgment, and the Court of Appeal issued that writ.

The Court of Appeal noted that the Attorney General had "added nothing, omitted nothing and the words used are all subject to common understanding." The Court then stated that, by contrast, "the term 'affirmative action'. . . is rarely defined . . . so as to form a common base for intelligent discourse. . . [Citations omitted.] . . . Most definitions of the term would include not only the conduct Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs." The Court then went on to state that use of the term "affirmative action" to describe the conduct prohibited by Proposition 209 would be "over inclusive" when the ban only prohibits discrimination and preference.1/

Thus, the Court has verified that the bans of Proposition 209 are limited, and that certain activities which may benefit underrepresented groups, including outreach programs, fall outside its scope.

2. Comparison With Equal Protection

It appears that the "preferential treatment" clause of Proposition 209 has essentially the same scope as the Equal Protection Clause of the Fourteenth Amendment.

Under the Equal Protection Clause, preferential treatment on the basis of race is analyzed using the strict scrutiny test.2/ "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." (Wygant v. Jackson Board of Education (1986) 476 U.S. 267, 273-74, quoting Fullilove v. Klutznick 448 U.S. 448, 491, 100 S.Ct. 2758, 2781, 65 L.Ed.2d 902 (1980) [opinion of Burger, C.J.].) Under this standard, a public entity must demonstrate that it has a compelling reason for granting the preference and that its approach is narrowly tailored to accomplish the objective. The courts have found that remedying the present effects of past discrimination can provide a compelling justification for a program aimed at assisting a particular racial or ethnic minority group. "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. (Regents of the University of California v. Bakke (1978) 438 U.S. 265, 307.) There need not be a judicial or legislative finding that intentional discrimination actually occurred, but "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (Wygant, supra, at 276.) The Wygant Court went on to hold that "a public employer ... must ensure that, before it embarks on a affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." (Id. at 277; See also, Richmond v. Croson (1989) 488 U.S. 469, 500; Coral Construction v. King County 941 F.2d 910, 921 (9th Cir. 1991); Podberesky v. University of Maryland 38 F.3d 147, 153 (4th Cir. 1994), cert. denied,115 S.Ct. 2001 (1995).)

At first glance it might appear that Proposition 209 would prohibit any preferential treatment on the basis of race, ethnicity, national origin, or gender, even to remedy the effects of past discrimination. However, careful consideration of this notion leads to a contrary conclusion.

The rationale for allowing the use of racial preferences in the remedial context is that, where there has been a finding of past discrimination, burdening innocent individuals is necessary to vindicate the rights of the victims of the discriminatory conduct. The U.S. Supreme Court made this clear in Bakke when it observed "After such findings have been made, the governmental interest in preferring members of the injured groups at the

expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." (Bakke, supra, at 307-09.)

Thus, if Proposition 209 precluded remedial use of preferential treatment, it would effectively infringe rights and remedies afforded to the victims of past discrimination by the United States Constitution. But this is not possible. The California Constitution declares the U.S. Constitution to be the "supreme law of the land." (Article III, Sec.1.) This California declaration mirrors that of the U.S. Constitution which provides, in pertinent part, that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." (U.S. Constitution, Article VI, Sec. 2.)

The California Constitution already includes an equal protection clause. (Article I, Sec. 7.) An argument that the California Constitution's Equal Protection clause should preclude bona fide affirmative action programs which would be allowed under the Federal Equal Protection clause was rejected by the California Supreme Court in 1981. (DeRonde v. Regents of University of California (1981) 28 Cal.3d 875, 172 Cal.Rptr. 677.) The DeRonde Court was considering the admissions program at the U.C. Davis Law School, but cited with approval its own decision in an affirmative action hiring program:

> "In Price, we upheld an affirmative action hiring program ordered by a county civil service commission as a means of alleviating an underrepresentation of minority employees attributable to past discriminatory employment practices by the hiring entity. We first observed that the county's hiring program was consistent with federal constitutional guarantees as declared by the United States Supreme Court in Bakke and in Steelworkers v. Weber (1979) 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480. We then examined and rejected the argument that the program was barred under state equal protection principles, explaining:
>
> "Although the state equal protection guarantee embodied in Article I, Section 7, subdivision (a) of the California Constitution does provide safeguards separate and distinct from those afforded by the Fourteenth Amendment (see Cal. Const., Art. I, S 24; see, e.g., Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 469, 156

Cal.Rptr. 14, 595 P.2d 592), the district attorney points to no authority which suggests that the California equal protection clause should be interpreted to place greater restrictions on bona fide affirmative action programs than are imposed by the Fourteenth Amendment. To the contrary, our past decisions construing article I, section 7, subdivision (a) reflects this court's recognition of the importance of interpreting the provision in light of the realities of the continuing problems faced by minorities today. (See Crawford v. Board of Education (1976) 17 Ca.3d 280, 301-302, 130 Cal.Rptr. 724, 551 P.2d 28.) Viewed from this perspective, we conclude that the state equal protection clause erects no barrier to a municipality's adoption of the kind of affirmative action plan authorized by rule 7.10. (26 Cal.3d at 284, 285, 161 Cal.Rptr. 475, 604 P.2d 1365.)

"Having held in Price, wherein an express quota was applied, that the state Constitution places no greater restrictions upon affirmative action programs encouraging increased minority representation than are imposed by the federal Constitution, a fortiori, under principles of stare decisis, we impose no state constitutional bar where the program involves no fixed quota but only consideration of race as one among several other qualifying factors. Although the University's admissions program at issue here is presented within the context of educational opportunity rather than employment hiring, the Price analysis is equally applicable." (Id, 28 Cal.3d at 890, 172 Cal.Rptr. At 685-686.)

In both Price and DeRonde, the California Supreme Court determined that the State's Equal Protection clause does not prohibit remedies which would be available under the U.S. Constitution's Equal Protection clause. It is not clear whether Proposition 209 is intended to be different than the existing California Constitutional requirement of equal protection which was considered in these cases. However, even if Proposition 209 does alter the state constitution, the reasoning of Price and DeRonde makes clear that it cannot infringe the federal law.

Moreover, the wording of Proposition 209 seems to confirm that it contemplates the use of preferential treatment where necessary to remedy past discrimination. Subsection (e) of the measure states "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." It is well-established that federal civil rights statutes such as Title VI of the Civil Rights Act of 1964 can require affirmative action where necessary to remedy past discrimination (Lau v. Nichols 414 U.S. 563 (1974)), so this is explicitly allowed under Proposition 209. Similarly, Subsection (g) of Proposition 209 states that "The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California anti-discrimination law." Programs benefiting women and minorities are expressly authorized under Government Code Section 11139, and may be required under the Fair Employment and

Housing Act (Cal. Code Regs., Title 2, Section 8104). Furthermore, as discussed above, Price and DeRonde make clear that affirmative action can be used to remedy past discrimination under the Equal Protection Clause of the California Constitution.

Thus, it seems clear that the ban on preferential treatment under Proposition 209 will have little, if any, impact. The Equal Protection Clause already prohibits any form of preferential treatment on the basis of race or ethnicity unless the program can withstand strict scrutiny, and as we have just demonstrated, Proposition 209 permits the use of preferential treatment when necessary to remedy the present effects of past discrimination. There remains the possibility that Proposition 209 might conceivably ban the use of preferential treatment under other circumstances where it would be permissible but not required under equal protection law. However, the courts have suggested only one situation, the need to promote diversity in higher education, which might justify the use of racial preferences for nonremedial purposes, and the continued viability of this theory is somewhat in doubt.

In Bakke, the U.S. Supreme Court carefully reviewed its earlier decisions on use of racial preferences and concluded "we have never approved preferential classifications in the absence of proved constitutional or statutory violations." (Bakke, supra, at 302.) After making this statement, Justice Powell went on to indicate that "the interest of diversity is compelling in the context of a university's admissions program." (Id. at 315.) However, this amounted to dictum because the Court ultimately found that the U.C. admissions process was not narrowly tailored and therefore failed the strict scrutiny test. (Id. at 320.) The diversity theory was subsequently relied upon by the Supreme Court in Metro Broadcasting, Inc. v. FCC 497 U.S. 547 (1990). However, Metro Broadcasting was later overruled on other grounds in Adarand Constructors v. Pena 115 S. Ct., 2097, 2127 (Stevens, J., dissenting), thereby creating uncertainty about the viability of the diversity theory. Two federal circuit courts have explicitly rejected the diversity theory (Hopwood v. Texas (84 F.3d 720 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581, 135 L.Ed.2d 1095; and Taxman v. Board of Education of Piscataway 91 F.3d 1547 (3rd Cir. 1996)), but the Supreme Court has not yet directly ruled on this question so promoting diversity may ultimately be upheld as a valid justification for affirmative action under the Equal Protection Clause.

This means that, if the courts eventually do uphold the diversity theory under the Equal Protection Clause, and Proposition 209 survives challenges to its validity, then it might have the effect of precluding institutions of higher education in California from engaging in conduct which would be permissible in the rest of the country. This prospect is both remote and speculative since it would depend on the outcome of litigation in two different arenas. Nevertheless, in the remainder of this analysis we will assume that Proposition 209 may, under these narrow and somewhat uncertain circumstances, restrict what is permissible under existing law.

D. Analytical Framework

Based on the foregoing, we can establish the following framework for analyzing the impact of Proposition 209 on particular programs or activities:

1. Does the program or activity involve outreach or other methods of encouraging participation which do not amount to providing preferences on the basis of race, sex, color, ethnicity, or national origin?

2. If the program or activity does involve a preference, was it undertaken as a remedy for past discrimination or underrepresentation so severe that it gives rise to an inference of discrimination?

3. Is the preference mandated by a court order or consent decree or required in order to maintain eligibility for federal funding?

If the answer to any of these questions is yes, then Proposition 209 will not affect the program or activity. Of course, answering each of these questions involves determining whether or not a preference is involved, which brings us back to the central problem with analyzing Proposition 209. Since the Proposition provides no definition of this term, it seems likely that the courts will look to the case law interpreting the Equal Protection Clause in order to determine which practices involve preferences.

Therefore, while we cannot precisely define preferential treatment, we can say that the only real impact of Proposition 209 would be to outlaw any type of nonremedial preference which might continue to be permissible under equal protection analysis. This is important from a conceptual standpoint and it would probably serve to discourage the use of preferences by clearly prohibiting some types of conduct which are arguably permissible under the Equal Protection Clause. However, the constraints imposed by the Equal Protection Clause are so restrictive that there may be few, if any, types of nonremedial preferences that would, in fact, survive an equal protection challenge. In effect then, the primary circumstance where Proposition 209 might have an impact (assuming it is upheld by the courts) is where programs have been developed and operated in order to promote diversity.

III. Potential Impact on The Board of Governors or the Chancellor's Office

In analyzing whether the Board could be charged with engaging in preferential treatment (as opposed to discriminating) on a basis made impermissible under Proposition 209, we will examine the three areas addressed in the Proposition: public employment, public education, and public contracting. Additionally, because the Board maintains its own operations as well as its interrelationship with the various community college districts, we will note that distinction as well within these three areas.

A. Preferential Treatment in the Operation of Public Employment:

Board of Governors Employees

The Board has no internal preference procedures that relate to its own employees. The Board itself employs the Chancellor. Other employees of the Board are either appointed by the Governor or through the State Civil Service system. (Ed. Code ¤¤ 71090, 71090.5, 71092.) The State Civil Service system, which is established by the California Constitution and implemented by statute, prohibits discrimination. (See, e.g., Gov. Code, ¤ 18500(c)(5).)

At the same time that discrimination is prohibited, the Board is required to have an affirmative action program. (Gov. Code, ¤ 19790.) The State Civil Service system also includes an upward mobility program. (Gov. Code ¤ 19400.) The lack of a definition of the scope of "preference" under Proposition 209 precludes any determination of whether the State's Civil Service System, and the Board's adherence to that System, violates the Proposition.

Of significant importance to the immediate actions of the Board, however, is the overriding restriction of Article III, Section 3.5 of the California Constitution. Under that provision, the Board of Governors is obligated to enforce statutes as written until those statutes are declared unconstitutional by an appellate court. The Board lacks the legal authority to make and enforce its own determinations that any statute (including any applicable Civil Service statute) is constitutionally unsound.3/

B. Preferential Treatment in the Operation of Public Employment: The Board and the Community College Districts

A significant question is raised as to whether Proposition 209 creates any Board obligation with respect to addressing any preferential treatment in employment (or education or public contracting) at the district level. This issue is raised by the unusual language of Proposition 209 itself: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

Proposition 209 specifically prohibits only certain activities "in the operation of public employment, public education, or public contracting." The prohibition does not simply address discrimination or preference "in public employment, public education, or public contracting." It is a prohibition against discrimination or preference "in the operation of public employment, public education, or public contracting." This phrase, "in the operation of," must enjoy some particular significance or it would not have been included in the Initiative. There is no definition of the scope of "the operation of public employment, public education, or public contracting." While the Board has general supervision over the community college districts, it clearly does not "operate" the employment, education, or public contracting activities of the districts. Accordingly, the Board may have no role whatsoever with respect to what the districts do in these

areas, assuming it is the districts and not the Board which "operate" in these areas.

We find no statute holding the Board of Governors responsible for operational decisions or activities of districts with respect to employment, education, or public contracting. Moreover, case law verifies that the Board is not liable for the actions of the districts. In 1987, the First Interstate Bank of California attempted to hold the Board of Governors responsible when a community college district failed to make lease payments in connection with a lease-purchase agreement. The Bank asserted that the leased building "as designed, planned and operated by the District, . . . could never have generated sufficient funds to cover its operating expenses, and as constructed by the District it could not function safely." The Bank claimed the Board of Governors was negligent because it had a duty to review and approve master plans for facilities and to review construction plans. The Court found no negligence on the part of the Board, and furthermore stated that "neither the state constitution nor any statute provides that a district's actions are undertaken on behalf of the state." (First Interstate Bank of California v. State of California and Board of Governors of the California Community Colleges (1988) 197 Cal.App.3d 627, 243 Cal.Rptr. 8, 11.)

The Board does not involve itself in the actual operations of the districts. The Legislature affirmed the Board's role in 1988 by stating that:

> "The Board of Governors of the California Community Colleges shall provide leadership and direction in the continuing development of the California Community Colleges as a integral and effective element in the structure of public higher education in the state. The work of the board of governors shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges." (Ed. Code ¤ 70901(a).) (Emphasis added.)

In delineating the roles of the Board and the districts, the Legislature has potentially excluded the Board from the prescriptions of Proposition 209, at least to the extent that the Board cannot be found to operate public employment, public education, or public contracting. Assuming, however, that Proposition 209 implicates the Board to the extent it has any effect on the districts, the Board's role is largely defined in setting regulations which are binding on the districts. Within the Board's role of providing general supervision over the community college districts in the area of employment, the Board has adopted a regulation setting a minimum standard related to affirmative action employment at the district level. (Ed. Code ¤ 70901; Cal. Code Regs., Title 5, ¤ 51010.) Education Code Section 87100 et seq. also requires both the Board and the districts to take certain actions to ensure diversity in district work forces. In our 1995 "Legal Analysis of Affirmative Action Programs in the California Community Colleges," we noted that the program required by these sections could be problematic from a constitutional standpoint. Two provisions in particular, could raise a

question of preference.

First, Section 87107 provides: "Also for the purpose of administering this fund [faculty and staff diversity fund], it is the intent of the legislature that the board of governors take the steps which are necessary to reach the goal that by fiscal year 1992-93, thirty percent of all new hires in the California Community Colleges as a system will be ethnic minorities." Although the foregoing could raise issues of "preferential treatment," the provision is effectively moot because the 1992-93 fiscal year has passed. Additionally, there is the question of whether Proposition 209 would be implicated because it only addresses "the operation of public employment," and the Board does not employ individuals for the various districts. Finally, even if the Board believed that the quoted language gave rise to preferential treatment, it would be precluded from ignoring the statute on that basis until an appellate court determined that the statutory provision were, in fact, unconstitutional. (Cal. Const., Art. III, Sec. 3.5.)

The second part of Section 87107, which requires consideration appears as paragraph (d): "The remainder of the fund shall be allocated to districts, in accordance with regulations of the board of governors, to provide for extended outreach and recruitment of underrepresented groups, for incentives to hire members of underrepresented groups, for in-service training and for other related staff diversity programs."

Lungren established that certain activities, including outreach activities, are not discriminatory or preferential under Proposition 209. However, the language suggests that financial incentives may be made available to districts which hire members of underrepresented groups. At first blush, this provision appears to encourage, if not grant, preferences. However, a closer examination demonstrates that for purposes of the Article of which Section 87107 is a part, "underrepresented groups" is in no way limited to those groups listed in Proposition 209. In particular, Section 87101 provides that "affirmative action employment program" means "planned activities designed to seek, hire, and promote persons who are underrepresented in the work force compared to their number in the population, including handicapped persons, women, and persons of minority racial and ethnic backgrounds." Because "underrepresented groups" is so broadly defined in Section 87101, it should not be assumed that the term is narrowed in Section 87107, so as to create preferential treatment on any basis prohibited by Proposition 209. Furthermore, once again, even if this section were interpreted to allow preferential treatment, the Board would have to comply until compliance were excused by an appellate court.

What the Board can do is to attempt to comply with legislative requirements in a constitutionally consistent manner. In response to Education Code 87100 et seq., the Board issued regulations related to district employment. At its May 1996 meeting, the Board adopted numerous revisions to these employment regulations to ensure that those regulations do not justify discrimination on any impermissible basis. Nevertheless, if Proposition 209 is upheld by the courts, these regulations will need to be reviewed again. Since the

outcome of such litigation is unknown, a detailed review of these regulations is neither possible or necessary at this time. A few preliminary comments can, however, be made.

The Board's regulations frequently imply the term "affirmative action," but as noted above, Proposition 209 does not use that term. Rather than be unnecessarily concerned with the use of the term "affirmative action," and in accordance with the Lungren Court's concession that "affirmative action" enjoys no universal definition, these regulations will need to be reviewed to ensure that they do not provide preferential treatment which is prohibited on the bases described in Proposition 209. This is unlikely because the regulations were carefully crafted to ensure that preferential treatment is only used under those limited circumstances where it is necessary to remedy past discrimination. If, however, the regulations were found to provide any prohibited form of preferential treatment, it would then be necessary to determine whether the preferential treatment can be eliminated and still satisfy the statute upon which the regulation is based. If the regulations can be revised to eliminate an impermissible preferential treatment without creating noncompliance with the statute, such revisions would be necessary if Proposition 209 is upheld by the courts. If, however, the regulations cannot be revised without offending the statute, the Board would not be able to revise the regulations without running afoul of Article III, Section 3.5, of the California Constitution.4/

C. Preferential Treatment in the Operation of Public Education: Board of Governors and the Community College Districts

As noted above, the Board does not operate public education, so the impact of Proposition 209 is unclear. Unlike the University of California and California State University systems, the Board oversees an open admissions system. Admissions processes do not exist in the same way they do in the other branches of California's public higher education system. Moreover, numerous legislative enactments already prohibit discrimination in the community colleges. For example, Government Code Section 11135 prohibits discrimination in any program or activity funded by or financially assisted by the state. The Board of Governors has adopted regulations implementing Government Code Section 11135 (Cal. Code of Regs., Title 5, ¤ 59300 et seq.) and requiring open admissions and enrollment to courses receiving state aid (Cal. Code Regs., Title 5, ¤ 58106). Proposition 209 appears to add nothing in the area of nondiscrimination.

In the past, the Board of Governors has participated in (but not operated) programs which specifically target particular groups. Recently, however, the Board entered into a settlement agreement in Camarena v. San Bernardino Community College District, et al, whereby the Board agreed that it would not develop, sponsor, endorse, or coordinate any academic program or service that either discriminated against students based on race, color, national origin, or ethnicity or that was intended for, designed for, or targeted to, students of a particular race, color, national origin, or ethnicity. To the extent that the Board has already agreed not to participate in such

programs, that point is moot. The settlement did not address gender. However, the Board has not developed, sponsored, endorsed, or coordinated any academic program or service that either discriminated against students based on gender or that was intended for, designed for, or targeted to, students of a particular gender.

The Chancellor's Office is in the process of implementing the settlement agreement. All Board regulations and funding mechanisms have been reviewed and appropriate changes have been made or are under way. In addition, an advisory is planned that will detail steps districts need to take to comply with the settlement agreement. Accordingly, no further changes are likely to be necessary in this area as a result of Proposition 209.

D. Preferential Treatment in the Operation of Public Contracting: Board of Governors

The Board itself is bound to contract in accordance with state statutes. Public Contract Code Section 10115 et seq. set contracting goals for the Board when it contracts for goods and/or services. These sections establish goals which the Board must meet with respect to awarding contracts to businesses owned by minorities, women, and disabled veterans. The Department of General Services has concluded, however, that the agency may decide which of its contracts will be subject to participation goals because the goals apply only to overall dollar amounts, and not to each contract. In addition, actual participation by minority or women business enterprises are not required if a successful contractor can demonstrate that a good faith (although unsuccessful) effort was made to include minority and women business enterprises. While the definition of "preferential treatment" is not settled, and assuming the contracting goals even as interpreted by the Department of General Services, constitute preferential treatment, the Board lacks the authority to ignore statutory requirements as being unconstitutional, unless and until those requirements are declared unconstitutional by an appellate court. As a consequence, the Board is bound, despite the provisions of Proposition 209, to continue its contracting activities in accordance with the Public Contract Code until the statutes are changed or are declared unconstitutional at the appellate level.

E. Preferential Treatment in the Operation of Public Contracting: The Board and the Community College Districts

The Board is required by Education Code Section 71028 to adopt regulations relating to district contracting with minority- and women-owned businesses. The regulations required by Education Code Section 71028 are additionally required to be consistent with the provisions of Article 1.5 (commencing with Section 10115) of Chapter 1 of Part 1 of the Public Contract Code. In response to this legislative directive, the Board adopted regulations starting with Section 59500 of Title 5 of the California Code of Regulations. These regulations establish only statewide goals, and permit district discretion in which contracts utilize goals. Once again, however,

the Board should review its regulations for compliance with the "nonpreference" requirement of Proposition 209. If preferential treatment is found, the regulations should be revised to the extent possible without undermining any Legislative directive.

IV. Impact of Proposition 209 on the Conduct of Community College Districts

The above preliminary analysis addresses the potential impact of Proposition 209 on the Board of Governors. The Proposition also applies, by its terms, to community college districts. The following is a preliminary consideration of the impact of the Initiative on those districts.

A. Prohibition to Discrimination in the Operation of Public Employment, Public Education, or Public Contracting

Each community college district is already specifically bound "to provide access to its services, classes, and programs without regard to race, religious creed, color national, origin, ancestry, handicap, or sex." (Ed. Code ¤ 72011.) Community college districts must also adhere to Board of Governors' regulations, including Title 5 of the California Code of Regulations, Section 59300, which prohibits discrimination on all of the bases covered by Proposition 209. Accordingly, Proposition 209 adds nothing to the nondiscrimination requirements which are already binding on the districts.

B. Prohibition to Preferential Treatment in the Operation of Public Employment, Public Education or Public Contracting

As noted above, Proposition 209 uses, but does not define the term "preferential treatment." The Lungren Court determined only that Proposition 209's ban on discrimination and preferential treatment was not the same as "affirmative action," and that a ban on "affirmative action" would be broader than a ban on discrimination or preferential treatment. At present, Lungren is the sole analysis of the Proposition 209 language.

1. Preferential Treatment in the Operation of Public Employment

The Legislature has directed community college districts to adopt "affirmative action employment programs." However, these programs are defined as "a conscious, deliberate step taken by a hiring authority to assure equal employment opportunity for all staff, both academic and classified." (Ed. Code ¤¤ 87100 et seq.) This Article does not, at any point, direct districts to grant preferential treatment to any person or group of persons on any of the bases precluded by Proposition 209. Even if it did, the districts would be powerless to ignore such mandate because of the prescriptions of Article III, Section 3.5.

As indicated in the analysis related to the Board of Governors, the provisions of Article III, Section 3.5, of the California Constitution require the Board to follow legislative mandates until they are declared

unconstitutional at the appellate level. The same requirement applies to community college districts. In fact, Article III, Section 3.5, may have a more pronounced effect on districts than on the Board itself. This is because districts must continue to comply with state statutes and with applicable regulations until such time as they are declared unconstitutional at the appellate level.

The scope of Article III, Section 3.5, has been extensively considered by the courts, and has been the subject of frequent review by the California Attorney General's Office. "Administrative agencies," i.e., those entities which must adhere to legislative enactments until they are declared unconstitutional by an appellate court, are not defined in the Constitution. The term has, however, been applied to local entities, including a county board of equalization (64 Ops.Atty.Gen. 690), county assessor (68 Ops.Atty.Gen. 209), and to a city arbitrator acting on municipal legislation. (Westminster Mobile Home Park Owners' Ass'n v. City of Westminster (1985) 167 Cal.App.3d 610, 213 Cal.Rptr. 640.) This last example is of particular importance because the Court found Article III, Section 3.5, applicable to "local" legislation stating that "[w]hile an ordinance is not a statute in every sense, it is a legislative enactment by the city's duly authorized legislative body. The purpose of Article 3, Section 3.5, is to deny administrators the power to refuse to enforce measures duly enacted by the authorized legislative body on the basis of the administrator's own assessment of the measure's constitutionality and in the absence of a final judicial determination of constitutionality." (Id. at 645.) 5/

Because the districts are subject not only to statutes, but also to the regulations of the Board of Governors, said regulations as well as applicable statutes appear to be "measures duly enacted by the authorized legislative body," and districts lack authority to refuse compliance based on their own assessment of unconstitutionality.

If and when changes are necessary in activities required by statute or Board regulation, districts will be duly notified. Apart from the conduct required by the districts either by statute or by Board regulations, the districts should review their hiring and employment documents and practices to identify situations where preferential treatment is being voluntarily provided on any basis prohibited by Proposition 209. In so doing, districts should consider any applicable court order or consent decree and any federal program that might include particular requirements as a condition of receipt of federal funding. The bans on discrimination/preferential treatment do not apply to the requirements of court orders or consent decrees in force on the effective date of the Proposition. Additionally, the bans on discrimination/ preferential treatment do not apply to the funding requirements of federal programs. Moreover, the discussion under Section II of this analysis suggests that the potential scope of Proposition 209 may be quite narrow. Nevertheless, in some limited circumstances, voluntary programs at the district level which provide preferential treatment on bases included in Proposition 209 could raise issues for individual districts. It is, however, recommended that final decisions about changes to programs be held in

abeyance pending the outcome of litigation over the validity and scope of Proposition 209.

2. Preferential Treatment in the Operation of Public Education

As noted above, districts are required to provide their activities and programs without regard to any of the bases covered by Proposition 209. Title 5, Section 51006 requires that courses be open to enrollment by any student who has been admitted to the college and meets properly established prerequisites. In addition, the settlement in the Camarena case has already resulted in restructuring of programs endorsed, sponsored, developed, or coordinated on a systemwide basis by the Board of Governors which may have involved preferential treatment on the basis of race or ethnicity. But this settlement did not cover programs developed and operated entirely at the local district level. Therefore, Proposition 209 may have some impact in this area. Districts should review their admissions and enrollment documents and their locally developed programs and activities to identify situations where preferential treatment is being voluntarily provided on any basis prohibited by Proposition 209. In so doing, districts should consider any applicable court order or consent decree and any federal program that might include particular requirements. Moreover, the discussion under Section II of this analysis suggests that the potential scope of Proposition 209 may be quite narrow. Nevertheless, in some limited circumstances, voluntary programs at the district level which provide preferential treatment on bases included in Proposition 209, could raise issues for individual districts. It is, however, recommended that final decisions about changes to programs be held in abeyance pending the outcome of litigation over the validity and scope of Proposition 209.

Preferential Treatment in the Operation of Public Contracting

The Board has adopted regulations related to the contracting activities of districts. The Board is specifically required to adopt these regulations by Education Code Section 71028. Section 71028 itself establishes a statewide participation goal for both minority business enterprises and women business enterprises. Revisions to the Public Contract Code adopted subsequent to Education Code Section 71028 have resulted in the addition of participation goals for disabled veterans in the Board regulations.

The Board regulations do not require goals at each district. Rather, the goals specified in Title 5, California Code of Regulations, Section 59500, are "statewide" goals. Furthermore, each district may determine whether it will seek participation by minority business enterprises or women's business enterprises for particular contracts. The regulations also encourage districts to undertake race- and gender-neutral approaches to improving participation, but do not require taking either characteristic into account.

Although no preferential treatment is apparent, it is nevertheless possible that the Board's public contracting regulations will ultimately need to be revised in light of Proposition 209. If and when this occurs, districts will

be duly notified. Apart from the contracting activities addressed by Board regulations, the districts should review their public contracting documents and practices to identify situations where preferential treatment is being voluntarily provided on any basis prohibited by Proposition 209. In so doing, districts should consider any applicable court order or consent decree and any federal program that might include particular requirements as a condition of federal funding. Moreover, the discussion under Section II of this analysis suggests that the potential scope of Proposition 209 may be quite narrow. Nevertheless, in some limited circumstances voluntary programs at the district level which provide preferential treatment on bases included in Proposition 209, could raise issues for individual districts. It is, however, recommended that final decisions about changes to programs be held in abeyance pending the outcome of litigation over the validity and scope of Proposition 209.

V. Conclusion

The meaning and validity of Proposition 209 is likely to be the subject of litigation for some time to come. However, this preliminary analysis suggests that even if it is ultimately upheld by the courts its impact on the community college system may be limited.

The prohibition of discrimination contained in the Proposition adds nothing to existing law and it appears that even the prohibition against preferential treatment will have little impact because outreach programs are still permissible and the use of preference is already severely limited by the Equal Protection Clause. Moreover, most of the affirmative action programs operated by community colleges or administered by the Board of Governors are mandated by statutes which would continue to apply unless an appellate court rules them unconstitutional. The impact on the Board of Governors is further diminished because the Board recently amended the regulations governing the faculty and staff diversity program to minimize the use of race or gender-based preferences and any such preferences which may have existed in programs for underrepresented students have been eliminated by the settlement in the Camarena case. The Proposition might require community college districts to eliminate preferences which are now provided through locally developed programs that are not mandated by state or federal constitutional or statutory law. It is, however, recommended that final decisions about changes to programs be held in abeyance pending the outcome of litigation over the validity and scope of Proposition 209.

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1. Associate Justice Sims concurred in the judgment on the basis that the Attorney General quoted the proposition language verbatim, and felt it unnecessary to reach the issue of whether using the term "affirmative action" would be over inclusive or would have fairly described the Initiative.

2. Under the case law interpreting the Equal Protection Clause of the

Fourteenth Amendment to the U.S. Constitution, distinctions based on sex or gender are reviewed under an "intermediate scrutiny" test. Under this test the distinction must be justified by an important governmental interest and the remedy must be substantially related to achieving that purpose. (Craig v. Boron 429 U. S. 190, 199 (1976), reh. denied, 429 U.S. 1124; Coral Construction v. King County 941 F.2d 910, 930 (9th Cir. 1990), cert. denied, 502 U.S. 1033, reh. denied, 503 U.S. 909.) However, the California Supreme Court has held that gender-based classifications must be judged using strict scrutiny under the California Constitution. (Koire v. Metro Car Wash (1985) 40 Cal.3d 24, 219 Cal.Rptr. 1330.) This has been a point of some controversy in the public debate over Proposition 209. Opponents have argued that Subsection (c) of the measure weakens the standard under California law by permitting the use of "bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting." Although this issue will undoubtedly be addressed in litigation, we will not explore it further in this analysis because, to our knowledge, no community college operates programs which accord preference on the basis of gender.

3. Subsection (h) of Proposition 209 provides that the measure is "self-executing." This generally means that no action is required by the Legislature in order for the measure to be legally enforced. (Leger v. Stockton Unified School District (3rd Dist. 1988) 202 Cal.App.3d 1448, 249 Cal.Rptr. 488.) However, this does not mean that Proposition 209 can automatically override another provision of the California Constitution which requires an appellate court to rule on the constitutionality of a state statute.

4. It should be noted that the constitutionality of Education Code Sections 87100 et seq. after the passsage of Proposition 209 is already the subject of litigation in Sacramento Superior Court in Californians Against Discrimination and Preference Inc. v. Board of Governors of the California Community Colleges, et al, No. 96CS03010. If this litigation ultimately results in an appellate court decision on the constitutionality of these statutes, then it may have a bearing on whether the Board can or should make revisions in its regulations in response to Proposition 209.

5. We realize that in denying review of this decision, the Supreme Court ordered it not published. We are not holding it out as a precedential decision, but only refer to it to demonstrate the application of Article III, Section 3.5 to local entities as already recognized by the State Attorney General.